**Mid-South Refrigerated Warehouse Company, Inc.** ***and*** **Highway and Local Motor Freight Employees, Local 667 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Cases 26-CA-8075-1, 26-CA-8423, 26-CA-8571,[1] and 26-RC-6076

26 February 1984

## DECISION, ORDER, AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 11 June 1981 Administrative Law Judge Stephen J. Gross issued the attached decision. The General Counsel filed exceptions and a supporting brief,[2] and the Respondent filed cross-exceptions and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions[4] and to adopt the recommended Order.

[1] The judge inadvertently omitted this case number from the caption of his decision.

[2] On the first day of the reopened hearing, 9 September 1980, the judge denied the General Counsel's motion to amend the complaint to allege that the Respondent violated Sec. 8(a)(3) and (1) of the Act by implementing a progressive disciplinary system on 1 September 1979. The General Counsel excepted to the judge's ruling. On 16 December 1982 the Board, by unpublished Order, granted the General Counsel's motion to amend the complaint and remanded the proceeding to the judge for further hearing and preparation of a Supplemental Decision. (Member Hunter dissented from the remand.) Thereafter, the General Counsel moved to withdraw the amendment to the complaint and close the record. By order dated 12 April 1983 the judge granted the General Counsel's motion, ordered the record closed, and transferred the case to the Board.

[3] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. I of his decision, the judge states that on 10 July 1980 he issued an order denying the General Counsel's motion to amend the complaint insofar as it related to a progressive disciplinary system, whereas, on 10 July, he deferred ruling on this portion of the motion and denied it on 9 September, the first day of the reopened hearing. In sec. II, he states that the election was held 10 October 1979, rather than 3 October. In sec. IX, he refers to employee Mason as Munson. These inadvertent errors are insufficient to affect our decision.

[4] The General Counsel excepts to the judge's failure to find that Vice President Gardner's statement, "Jimmy, your guess is as good as mine," in response to employee Lackland's question, "will this affect my year-end bonus?" violated Sec. 8(a)(1) of the Act or at least constituted objectionable conduct. We find the General Counsel's exception is without merit. In so doing, we note that the General Counsel has not adduced any evidence with respect to the nature of the year-end bonus, and we find that the General Counsel has not established that Gardner's response, in context, was either unlawful or objectionable.



## ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

IT IS FURTHER ORDERED that the objections to the election conducted in Case 26-RC-6076 on 3 October 1979 are overruled.

## CERTIFICATION OF RESULTS OF ELECTION

IT IS HEREBY CERTIFIED that a majority of the valid ballots have not been cast for Highway and Local Motor Freight Employees, Local 667 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and that it is not the exclusive representative of these bargaining unit employees.

## DECISION

### I. INTRODUCTION

STEPHEN J. GROSS, Administrative Law Judge: On August 22, 1979, Teamsters Local 667 (Local 667 or the Union) filed a petition with the Board seeking a representation election at Mid-South Refrigerated Warehouse Company (Mid-South).[1] The election at Mid-South was held on Ocotber 3, 1979, pursuant to a Stipulation for Certification Upon Consent Election approved by the Regional Director for Region 26. Thirty-six unchallenged ballots were cast against Local 667, 23 were cast for it. There were not enough challenged ballots to affect the result of the election. Thereafter the Union filed timely objections to the election.

One day prior to the election, October 2, Local 667 filed a charge claiming that Mid-South had issued warnings to eight named employees because of the employees' membership in and activities on behalf of the Union. Local 667 also charged Mid-South with various other acts of coercion.

The Union's charge (which was subsequently amended on November 16) became the basis for a complaint issued by the Regional Director for Region 26 on November 19, 1979. According to the complaint, one of Mid-South's supervisors, Phil Gardner: (a) created an impression among its employees that their union activities were under surveillance and (b) threatened employees with loss of jobs and benefits if employees voted for Local 667. The complaint also alleged that, beginning in early September, Mid-South enforced its work rules in a more stringent manner against eight named employees. According to the complaint, Mid-South thereby violated Section 8(a)(1) and (3) of the Act.

The Union had claimed that the following conduct by Mid-South affected the result of the election: (1) alleged promises by Mid-South's president, Jack Edwards, that

[1] All parties agree that Local 667 is a "labor organization" within the meaning of the Act and that Mid-South is an "employer" engaged in "commerce."

Mid-South would give raises to employees if the Union were defeated; (2) interrogation, harassment, coercion, and threats directed against employees prior to the election; (3) suspension of an employee because of the employee's action at a meeting called by the Company; (4) issuance of warnings to eight named "prospective voters"; and (5) increasing the workload of known union adherents immediately preceding the election.

On November 11, 1979, the Regional Director issued a report recommending that Objections 1 and 3 be overruled; that Objections 2, 4, and 5 be considered at a hearing; and that that hearing be consolidated with Case 26–CA–8075. No objections were filed to the Regional Director's report.

On December 11, the Board adopted the Regional Director's recommendations. And on January 14, 1980, the Regional Director consolidated the hearing ordered by the Board's December 11 order with the hearing in Case 26–CA–8075. The case subsequently went to hearing in Memphis, Tennessee, on March 6 and 7, 1980.

On May 5, 1980, the Union filed a further charge against Mid-South claiming that since March 3, 1980, Mid-South had in various ways interfered with the Section 7 rights of its employees, and that Mid-South had suspended an employee on or about March 14, 1980, because of the employee's membership in and activities on behalf of Local 667.

On June 13, 1980, the General Counsel moved that the hearing be reopened and that the complaint be amended. The amendments proposed were allegations that Mid-South: (1) adopted a "progressive disciplinary system" on September 1, 1979, for discriminatory reasons; (2) enforced its work rules in a more stringent manner by issuing warnings to various named employees on six specified dates between March 14 and May 12, 1980; and (3) suspended an employee pursuant to the progressive disciplinary system.

On July 10, 1980, I issued an order: (1) granting the General Counsel's motion to reopen the hearing; (2) denying the General Counsel's motion insofar as it related to a progressive disciplinary system;[2] and (3) granting the General Counsel's motion to amend in all other aspects.

On August 28, 1980, the General Counsel again moved to amend the complaint. The proposed amendments alleged that: (1) in July 1980 a Mid-South supervisor inferred that a wage increase was associated with adoption of an antiunion stance by the recipients of the wage increase and (2) Mid-South first demoted (in July) and then discharged (in August) an employee for reasons violative of Section 8(a)(3) and (4) of the Act. I granted the motion to amend.

The General Counsel has filed two briefs, one after the March hearing and the second after the September hearing. Mid-South and Local 667 each filed one brief (after the September hearing). The case stands ready for decision.

## II. BACKGROUND

Mid-South operates three refrigerated warehouses in Memphis. Employees refer to the three facilities as "Main" (where Mid-South's corporate offices are located), "the Annex," and "Chelsea." All of the alleged violations occurred at the Annex, and all of the alleged discriminatees are (or were) employed at the Annex.

The Annex facility handles only frozen foods. All storage space in the Annex accordingly is kept at subzero temperatures. Frozen foods arrive at the Annex by either rail or truck, and, either way, laborers unload the merchandise onto unrefrigerated dock areas in the warehouse where the goods are tallied by "checkers."

A "puller," after recording the type and quantity of the goods, moves them into one of the storage areas, using a large forklift to do so. (Each puller works in a designated storage area and is responsible for the orderliness of that area. As that indicates, the pullers' job require them to spend most of their working day in subzero temperatures. They wear heavy clothing, including special boots and "freezer suits." Nonetheless the work is bone-chilling, and the Company provides a "warmup room" for the pullers.)

Goods are moved in the other direction pursuant to a delivery ticket that spells out the type of merchandise to be delivered, the quantity (generally in cases), and the address of the consignee. A puller, again using a large forklift, withdraws the merchandise designated by the delivery ticket from the storage area and deposits it on the dock. There a checker insures that the merchandise is correct in number and type. And finally laborers load the merchandise into the appropriate vehicle.

In early August 1979, one of the pullers in the Annex, Sylvester Maxwell, met with officials of Local 667 to discuss organizing Mid-South's employees. As touched on above, that led to the filing by Local 667 of a representation petition on August 22 and an election among Mid-South's employees (at all three facilities) on October 10.

## III. THE PREELECTION PERIOD; ALLEGATIONS INVOLVING SUPERVISOR BILL TUCKER

### A. *Supervisory Changes in September 1979*

For a considerable period up until early September 1979 there was only one supervisor on the day shift at the Annex, Joe Berretta. Berretta's primary interest lay in the administrative side of warehouse operations, and he appeared not to concern himself particularly with em-

[2] At the March hearing there was testimony to the effect that in September 1979 Mid-South decided to institute a more formal disciplinary system involving the use of written forms and a specific hierarchy of disciplinary measures. There was further evidence to the effect that that decision was not implemented until some time after the election. The complaint under consideration at the March hearing did not refer to the new disciplinary system, no party sought to amend the complaint in that regard at the hearing, and the General Counsel's brief of April 10, 1980, while referring to the new company policy, failed to suggest that any amendment be made to the complaint in that respect. Then, on June 13, in his motion to reopen, the General Counsel sought to amend the complaint to include various allegations pertaining to Mid-South's progressive disciplinary system. The motion papers failed to provide any explanation for the tardiness of the request and, although given the opportunity to explain that failure at the hearing in September, the General Counsel again could give no reason why I should consider evidence of the progressive disciplinary system to be either newly discovered or unavailable at the March hearing (see, e.g., *Heat Research Corp.*, 243 NLRB 206 fn. 1 (1979)).

ployee work habits. From the employees' point of view, therefore, things in the warehouse were relatively relaxed.

On September 2 Mid-South assigned a second supervisor to the warehouse, Billy Tucker. Tucker's interests were diametrically opposite to Berretta's. He was very much interested in employee work habits, and things did not tend to be relaxed within eyeshot of Tucker. There is no doubt that the employees knew forthwith that Tucker's arrival at the Annex meant change since they knew Tucker was a disciplinarian. Tucker had been the sole supervisor at Mid-South's Chelsea facility, and the Annex employees had heard that Tucker had been "firing them over [at] Chelsea."[3]

### B. *The Alleged Violations of the Act Attributed to Billy Tucker's Actions*

Tucker quickly started demanding that the Annex employees spend more time at work and less at rest than was the employees' custom. That occurred in various situations. But the employees' major complaint about Tucker had to do with Tucker's reaction to the amount of time the pullers spent in the warmup room. Tucker was insistant that the pullers adhere to the Mid-South rule permitting a maximum of 10 minutes out of every hour in the warmup room. A number of the employees were incensed about Tucker's demand. They claimed (to Tucker in September and then again in their testimony at the hearing) that there was no such rule, and that they were doing nothing wrong by remaining in the warmup room for periods considerably in excess of 10 minutes. The employees' complaints did not slow Tucker up at all, and while he did not formally discipline any employee during the preelection period, he made it very clear that any puller who wanted to remain employed by Mid-South had better limit his stays in the warmup room to 10 minutes or less, absent unusual circumstances specifically authorized by a supervisor. At the hearing both Tucker and Gardner credibly testified that the 10-minute-per-hour rule had been in affect at Mid-South for at least 10 years and perhaps longer.[4] And Tucker said that his actions regarding the warmup room limitation at the Annex were no different than his behavior prior to his arrival at the Annex. Tucker did agree, however, that the 10-minute rule was not a written one, and that Mid-South did not make any efforts to advise employees of that rule or any other rule regarding conduct at work. Nonetheless, said Tucker, the rule was known by all employees, and when he originally began work at Mid-South as an employee, he quickly learned of that rule (among many others) from his fellow employees.

### C. *Tucker's Actions in the Preelection Period—Conclusion*

Tucker arrived at the Annex about 1 month before the election. And there is no doubt that the pullers at the Annex had to work harder after Tucker arrived. Tucker saw to that. But it is also clear that Tucker's crackdown on the work habits of the Annex employees had nothing to do with the Section 7 activities of the employees.

For one thing, there was no showing that Tucker's behavior (in the Annex) after the employees began their unionization efforts was any different than it was (at Chelsea) before that time. In fact the evidence cuts the other way. He was known as a tough disciplinarian at his prior assignment at the Chelsea facility, which was prior to any unionization efforts, and he continued that pattern, at the Annex, after those efforts got underway.

Secondly, even had the record shown that Tucker was tougher with the employees at the Annex than he had been at Chelsea, that would have proven little. The Annex assignment was a promotion for Tucker, and it would have been understandable if that had led Tucker to become more demanding, if only to show that "[he was] more efficient more than [his] predecessors." *Mid-Island Textile Industries*, 214 NLRB 484, 493 (1974). In any case, as noted above, there was no such showing.

Third, while the General Counsel urges otherwise, there is no showing that Tucker created a new set of rules for the employees to follow. The Company had long had a 10-minute-per-hour warmup room rule, and it was clear from the testimony and demeanor of the pullers that they knew full well they were supposed to spend 50 minutes out of every hour at work. As for Tucker's insistence that the men keep working (when they were not on their 10-minute breaks in the warmup room), Tucker's criticisms of that nature were appropriate. The rule that worktime is for work is a standard one. And the record does not suggest that that was not the case at Mid-South prior to Local 667's organizing efforts.

In sum, there has been no showing that Tucker's demands that the employees increase the proportion of the time they spent working was in any way affected by Tucker's knowledge of the employees' organizing efforts.

There remains the question of whether management's decision to assign Tucker to the Annex was based on antiunion considerations. While I do not think that it was, the question merits discussion and is considered below.

## IV. THE COMPANY'S DECISION TO SWITCH TUCKER TO THE ANNEX

As discussed above, the supervisory situation at Mid-South in August 1979, when the Union filed its representation petition, included the facts that: (1) Berretta, the sole supervisor at the Annex, was easygoing in his attitude toward employees; and (2) Tucker, who was then foreman of the Chelsea operation, was quite the opposite, a disciplinarian. Mid-South must have known of the difference in the supervisory styles of the two foremen. Given the additional facts that one of the employees at the Annex was responsible for first contacting the Union, that a number of Annex employees advertised their prounion attitudes, and that the day shift at the Annex was the largest shift at any of Mid-South's facilities, the timing of Mid-South's switch of Tucker from Chelsea to the Annex could suggest antiunion motivation on Mid-South's part. Certainly some of the employees at the Annex seemed to feel that there was a connection between their unionization efforts and the Company's deci-

[3] Tr. 127 (Witness Lackland).

[4] See also testimony of employee Tobey Munson at Tr. 274–275.

sion to move Tucker to the Annex. As Annex employee Lackland testified, "the general atmosphere" among the Annex employees was that Tucker "was brought from Chelsea to have someone fired before the election."[5]

But the record fails to substantiate Lackland's suspicions.

To begin with, there was no showing that the Company knew which employees had sought out the Union.

Secondly, there is no indication in the record that Annex employees more heavily supported the Union than employees at the Chelsea or Main facilities. Similarly, the record does not indicate that Mid-South's management held any views about which of its facilities were most prounion.

Thirdly, the reasons the Company gave for its decision to shift Tucker to the Annex and the timing of that shift make sense and were unrebutted. Prior to April 1978 Mid-South had one supervisor at Chelsea and two at Main. There was only one foreman at that time at the Annex, but Mid-South's head of warehouse operations, Phil Gardner, spent most of his time at the Annex and helped supervise employees there. In April 1978 one of the supervisors at Main left Mid-South. Gardner thereupon moved to Main, leaving only one supervisor, Berretta, at the Annex. About that same time Gardner started grooming employee Bill Tyra to become a foreman so that the Company could eventually get back to its earlier supervisory level.

The busy season at the Annex starts in September. Gardner credibly testified that under all these circumstances the Company decided to make Tyra supervisor of its smallest operation (Chelsea) in September 1979 and at the same time to move Tucker, who had once worked as a employee at the Annex and who was an experienced supervisor, to the Annex. And what all that adds up to is that the Company had a sound reason having nothing to do with the employees' unionization efforts to move Tucker to the Annex in September 1979.

### V. GARDNER'S PREELECTION ACTIONS

Annex employee Lackland testified that sometime early in September 1979 Gardner told Lackland that "every time something comes up concerning this Union . . . your name is mentioned."[6] Lackland testified that Gardner went on to say that:

> . . . a vote for the Union, that means that you will lose all of your benefits and probably . . . your job. But a vote for the Company, you'll restore all of your benefits and keep your job as long as you want to work here.[7]

Gardner denied ever saying any such thing. Gardner agreed that he had a conversation with Lackland early in September. But Gardner testified that Lackland originated it by asking, "what was happening?" Gardner said that he responded, "you know as well as I do."[8] Lackland went on to ask, Gardner testified, "will this affect my year-end bonus?" According to Gardner he said, "Jimmy, your guess is as good as mine."[9]

I believe Gardner, not Lackland. Throughout much of Lackland's testimony, both at the March hearing and the reopened hearing in September, I got the impression that Lackland either deliberately shaded his testimony in his own favor or had the kind of memory that led him to recall events as he wished they were or felt they should have been. Gardner's recollections, on the other hand, seemed to more closely track what apparently had happened.[10]

Two other allegations regarding Mid-South's preelection conduct also involved Gardner. One involved an admitted mistake by both a puller and a checker that eventuated in an incorrect shipment going out to a customer. Gardner criticized the personnel involved. In the course of criticizing the checker Gardner said, according to the checker (Lewellen) "I know that you're in on this deal."[11] Gardner denied making any such statement, and I credit that denial.[12]

The checker also testified that Gardner said: "You people think you've got it bad around here. A lot of places, if you made this kind of mistake, you'd be gone."[13]

There is no dispute that Gardner made that statement. And while Gardner's "you people" phraseology could be deemed to be a reference to union supporters, the statement was far too unspecific and ambiguous to constitute any form of violation of the Act.

As a final matter relating to Gardner, in early September Gardner came across two Annex employees standing together on the dock. He told them to stop talking and to keep moving. It is unremarkable for a supervisor in Gardner's position to tell employees to get back to work when he sees them socializing during worktime. The incident signifies nothing.[14]

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[5] Tr. 122; see also Tr. 127.

[6] Tr. 82. In quoting from the transcript I will sometimes change pronouns and tenses to fit the context in which the quote is used.

[7] Id.

[8] Tr. 350.

[9] Tr. 350–351.

[10] In *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978), the Board referred to testimony by two employees that was "in direct contradiction of certain statements of their present supervisors." Neither employee was a charging party and neither was alleged to be a discriminatee. "The testimony of a witness in such circumstances," said the Board, "is apt to be particularly reliable, inasmuch as the witness is testifying adversely to his or her pecuniary interest, a risk not lightly undertaken." At the time Lackland testified on this matter he was still employed by Mid-South, and the General Counsel argues (at p. 5 of his October 20 brief) that *Gold Standard* applies to Lackland's testimony. I did follow the reasoning of *Gold Standard* in evaluating some of the testimony in this proceeding. But at both hearings in this proceeding, Lackland and several other General Counsel witnesses clearly saw their interests as allied with the Charging Party's and made no effort to hide the hostility to Mid-South's supervisors. Application of the *Gold Standard* approach to the testimony of those employees would not help in the search for the truth.

[11] Tr. 131–132.

[12] Lewellen seemed to be burning with hostility and rage to the extent that his recollections could too easily have been distorted. His discharge by Mid-South (which is not claimed to be discriminatory) added to that likelihood. Moreover a statement like "I know you're in on this deal" did not sound like the sort of thing Gardner would say.

[13] Tr. 131.

[14] There was some testimony of various other incidents of alleged harassment by supervisors, including a claimed antiunion speech by Mid-South president, Edwards. But I subsequently ruled that matters pertain-

*Continued*

## VI. POSTELECTION INCIDENTS

While the complaint is not entirely clear, it appears that the General Counsel alleges that all criticism of and disciplinary measures against the eight named employees[15] up until the time of the first hearing (March 6, 1980) constituted violations of Section 8(a)(3) of the Act.[16] This part of the decision will cover the period October 3 (the date of the election) until early March 1980.

### A. *November 15, 1979, Written Warning of Lackland*

Tucker wrote Lackland up for "improper warehousing" on the ground that Lackland miscounted merchandise (apparently in the process of storing it in the freezer).[17] No one claims that the warning misstated any facts and it was not unusual for the Company to discipline employees for miscounts. There is no evidence that the incident represented discriminatory treatment by the Company.

### B. *The December 6, 1979, Written Reprimand of Lackland and Willie Deener*

On December 6, 1979, Tucker issued written reprimands to Lackland, Willie Denner, and Rufus Dansby for staying in the warmup room too long.[18] As I view the record, those reprimands represented only what they purported to be: Discipline of employees for violating Tucker's explicit instructions about the time limit for remaining in the warmup room. For one thing, there is no indication that antiunion employees would have been treated in a dissimilar way. Rather, the reverse is true. Dansby, one of the three employees disciplined on December 6, was the Company's observer at the election on October 3. For another, Tucker had made it very clear during the preceding couple of months what he expected of employees in regard to sojourns in the warmup room (as discussed above). When Dansby, Deener, and Lackland ignored those repeated instructions by Tucker, they deservedly were disciplined.

### C. *The December 28 Written Reprimand of Lackland*

On December 28 Lackland received a writtem reprimand on the ground that he had made four errors in pulling an order.[19] It is undisputed that he did make those errors, and the Company routinely does discipline employees for miscounts. There is no evidence that the reprimand constituted discriminatory treatment.

### D. *February 12, 1980, Warning of Lackland*

When a forklift is carrying any substantial quantity of goods and the forks on which the goods are resting are not close to the floor, it is difficult for the driver to see where he is going. For that reason, among others, Mid-South's forklifts have printed on them an instruction that the forks must be kept close to the ground when the forklift is moving (OSHA rules are comparable). On February 12, 1980, Lackland drove his forklift out of the freezer while carrying a rack of goods with the forks in a high position. Lackland failed to see Gardner and Tucker standing nearby and came within inches of hitting Tucker. Gardner stopped Lackland, criticizing him for driving improperly, and put a note regarding the incident in Lackland's personnel file.[20]

Several of the General Counsel's witnesses claimed that starting about the time of the election Tucker and Gardner deliberately began walking in front of the forklifts. I credit Tucker's denial. I further credit the discription of the incident as portrayed in Tucker's testimony and in Gardner's note. There is nothing about the incident or the criticism of Lackland that followed that represents discriminatory behavior by Mid-South.

### E. *February 13, 1980, Warning of Lackland*

According to a note dated February 13, 1980, on that date Gardner saw Lackland driving his forklift "in a fast and dangerous manner."[21] The note goes on to indicate that Gardner told Lackland that unless Lackland drove safely "disciplinary action would be taken." (Lackland did not contend that he was driving normally. Rather he told Gardner that he was trying to get goods from the dock into the freezer as fast as possible.)

It is not unusual for Mid-South to criticize and discipline employees for unsafe forklift driving. Here one day after Lackland had been criticized for driving with the forks up and consequently nearly colliding with his foreman he was again seen driving too fast. The resulting warning was to be expected. Nothing about the incident suggests discriminatory motivation by Mid-South.

## VII. MID-SOUTH'S DISCIPLINARY ACTIONS AGAINST LACKLAND, MARCH 14 THROUGH AUGUST 1, 1980

Lackland was a prounion employee from the start; he testified on behalf of the General Counsel at the March 1980 hearing in this proceeding; and then, that same month, began wearing a "Teamsters" windbreaker to and from work. (He was the only Mid-South employee to wear such a garment.) The General Counsel and Local 667 claim that Lackland's well-advertised prounion stance and his testimony on behalf of the General Counsel in March led the Company to focus its attention on him and ultimately to fire him. The incidents in question are the following: Mid-South's 2-day suspension of Lackland on March 14, 1980; criticism of Lackland and several other employees sometime in the neighborhood of mid-April 1980 for remaining in the warmup room too

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ing to that alleged speech were outside the scope of this proceeding. See in this connection G.C. Exhs. 1(h) and (g) (letter dated November 7, 1979).

[15] James Lackland, Doug Miller, Sylvester Maxwell, Willie H. Deener, Forrest Deener, Charles Lewellen, Oscar L. Jones, and Adam Hill, Jr.

[16] The original complaint (in Case 26-CA-8075) referred generally to Mid-South enforcement "on or about September 3, 1979, and at all times thereafter" of work rules "in a more stringent manner" by Mid-South "issuing . . . verbal and written warnings, to the eight employees listed above. The amendments to the complaint, on the other hand, refer to eight specific events, the earliest of which occurred on March 14, 1980.

[17] G.C. Exh. 4(e).

[18] G.C. Exhs. 3(a), (b), and (c).

[19] G.C. Exh. 4(f).

[20] G.C. Exh. 4(i).

[21] G.C. Exh. 4(j).

long; further criticism of Lackland and another employee sometime in mid-April; the July 18, 1980 demotion of Lackland; and the August 1, 1980 discharge of Lackland. These various incidents are discussed below.[22]

### A. *The March 14 Suspension of Lackland*

Sometime early in the week of March 10, 1980, Lackland made a high speed U-turn. Lackland's clipboard skidded off the forklift onto the floor and the turn made tire marks on the floor. Tucker happened to be nearby. He told Lackland to slow down, pointed to the tire marks on the floor, and discussed with Lackland the cost of replacing forklift tires.[23]

Later that same week, on March 14, Lackland, on his forklift, collided with an electric "scooter." Tucker again was nearby. As Tucker witnessed the event, Lackland backed out of the freezer, continued straight down the warehouse aisle for another 30 feet or so, and then smashed into the scooter. The impact was considerable and the scooter was moved about 18 inches across the floor. Tucker testified that Lackland then began to drive away from the site of the accident. Lackland claimed that the scooter was parked out of his line of sight behind a larger vehicle and that he hit the scooter after swerving around the other vehicle. Tucker disagreed.

The record indicates that there was no substantial damage to either Lackland's forklift or the scooter. But it is clear that: (1) there was a sharp impact between the two vehicles; (2) Lackland drove off without stopping and in a manner that indicated that he intended to ignore the fact of the accident; (3) whether or not Lackland had to swerve to avoid another vehicle, the collision with the scooter was a product of carelessness on his part.

The General Counsel and Local 667 claim that there was nothing unusual about forklift accidents at Mid-South. To some extent that appears to be the case. On the other hand it is not uncommon for Mid-South to discipline employees for unsafe forklift driving, particularly when the improper driving has resulted in an accident of some type. And here there was substantial impact between the two vehicles; it was witnessed by a supervisor; the driver (Lackland) had been criticized three different times within the past month or so for unsafe forklift driving; and the driver appeared to have no intention of reporting the accident. Under all these circumstances it is not surprising that Tucker determined to take disciplinary action against Lackland. The nature of that action was a 2-day suspension.

There is nothing about the incident that suggests discriminatory motivation on the part of Mid-South.

### B. *The Warmup Room Incident*

Sometime in the spring of 1980, and probably about mid-April, Lackland, Oscar Jones, Forrest Deener, Willie Deener, and, perhaps, Sylvester Maxwell remained in the warmup room several minutes in excess of the 10-minute maximum that Tucker had been insisting upon. Gardner noticed that and criticized the employees for that behavior. No formal disciplinary action was taken and nothing was entered into any of the employees' personnel files about the matter.

This seems to have been the first time in a long while that Gardner had said anything to employees about remaining in the warmup room too long. While in some circumstances that could be suspicious, Gardner knew that Tucker had been insisting that employees adhere to the 10-minute limit, the employees were not formally disciplined, and nothing that Gardner said related to anything but the fact of the employees overstaying their time in the warmup room. Under all these circumstances I cannot find that the record supports the claim of the General Counsel and Local 667 that Gardner's action was discriminatorily motivated.[24]

### C. *The April "No Talking" Incident*

Sometime in mid-April, Foreman Joe Berretta noticed Lackland and Forrest Deener chatting in one of the Annex's freezer areas. Berretta separately called Lackland and Deener to the side and told each of them that their time in the freezer was for working, not talking, and that they should save conversation for the warmup room. No formal disciplinary action was taken against either Lackland or Deener. Berretta's criticism was very mild, Berretta in no way suggested that his employee, and all-in-all the incident was a trivial one. I have considered the fact that Berretta was known as a lenient supervisor (as discussed earlier). Nonetheless the record fails to support any suggestion that Berretta's action was motivated by any protected activity of any employee.

### D. *Lackland's Demotion on July 15, 1980*

Three incidents relevant to Lackland's relationship with Mid-South's management occurred between April and July 15, 1980. The first, in mid-May, stemmed from a miscount by Lackland of some merchandise he stored in the freezer. Lackland received a written reprimand for making the error.[25] (The General Counsel does not claim that the reprimand was discriminatorily motivated.) The second related to a collision between a forklift driven by Lackland and a rack of merchandise. Tucker told Lackland that he was not going to be disciplined because the accident was caused at least in part by the improper placement of the merchandise by the night crew. The third incident involved a compliment of Lackland by Tucker—in early July Tucker told Lackland that he was doing good work.

Then, on July 15, Lackland failed to lower the forks of his forklift far enough while picking up some cases of

[22] Evidence concerning these incidents was heard at the reopened hearing (in September 1980).

[23] Lackland denied leaving skid marks on the floor or any discussion by Tucker of tire marks. I credit Tucker.

[24] The employees testified that Tucker had told them that they could remain in the warmup room up to 15 mimutes, and that they said this to Gardner. That testimony is largely irrelevant in regard to Gardner's motivation in criticizing the employees. In any case the record in this proceeding makes it clear that Tucker was strict about the 10-minute rule and that he at no time indicated that employees could freely remain in the warmup room for as long as 15 minutes. Tucker had told employees that they could remain in the warmup room in excess of 10 minutes upon specific approval by a supervisor. But none of the employees criticized by Gardner claimed to have received any such specific approval.

[25] G.C. Exh. 9.

potatoes at a dock area of the warehouse. Two of the cases were punctured. Lackland backed up, lowered the forks, picked up the rack of cases, and started to move off toward the freezer. Tucker was nearby and had seen the incident. He stopped Lackland and told him to remove the damaged cases from the rack. Not long thereafter Tucker removed Lackland from his forklift driving job and assigned him to a job that entailed manual labor—unloading railroad cars. The job change clearly was a demotion, resulting railroad cars. The job change clearly was a demotion, resulting in a pay cut of from $4.70 per hour to $4.15 per hour.

The General Counsel and the Union claim that the demotion was obviously discriminatorily motivated. They cited testimony to the effect that damage of goods by forklift drivers is a nearly daily occurrence at Mid-South; in this instance Lackland did not even know that he had damaged anything; the damaged goods had a very low value; and in many instances of employee damage to goods that came to the attention of Mid-South supervisors, the employees were not disciplined in any way, much less demoted. Finally, the General Counsel and the Union point out that there is no record of Mid-South ever having demoted any employee except for Lackland.

The Company argues that by this time Lackland had been warned numerous times about his forklift driving; that the instances cited by the General Counsel and the Union regarding employees not being disciplined for damaging goods were always accompanied by extenuating circumstances; that Lackland must have known that he had damaged the cases of potatoes; and, most importantly, Lackland's failure to immediately separate the damaged cases from the good ones was a serious breach of his responsibilities.

The record supports Mid-South. First, the events leading up to the July 15 incident fail to reflect any intent on Mid-South's part to attack Lackland for his prounion behavior. As for the July 15 incident itself, the record is clear that Lackland knew that he had damaged the potatoes and that he planned to place the entire rack of potatoes, including the damaged cases, in the freezer without doing anything about the damage the record is also clear that Mid-South supervisors find particularly objectionable any failure by employees to report and deal with damage they have caused. As for the relatively low cost of the damage done, under the circumstances that was of much less significance than Lackland's record of careless forklift driving and his apparent attempt to cover up the accident.

While Mid-South had never before demoted anyone, that says little. Mid-South has fired employees for various kinds of unsatisfactory performance. And demotion is obviously less severe than discharge. As Tucker put it, "I would consider that [Lackland's demotion] trying to keep a man on his job."[26] In sum, the record fails to substantiate any claim that Mid-South's demotion of Lackland was discriminatorily motivated.

[26] Tr. 915.

### E. *Lackland's Discharge*

The job of unloading railroad cars at Mid-South is tough physically—it involves the day-in-day-out manhandling of cases weighing 10 to 40 pounds. And while the temperature in the cars does not get hot, it can get warm. Lackland had spent about 2 years unloading railroad cars for Mid-South, from about 1974 to 1976. But the job from which he was demoted was poor preparation for the railroad car work. Lackland's job as a puller involved little if any heavy manual labor, and the temperatures in which Lackland spent his working day were in the subzero range.

Tucker was aware of that and testified credibly that he determined to give Lackland a week to get in shape and did not attempt to evaluate Lackland's performance during that first week.

Mid-South uses a crew of three employees to unload each railroad car. Soon after Lackland began his new assignment, one of Lackland's coemployees complained to Tucker about Lackland. According to that employee, Lackland spent his time complaining about the job, "slowed everything down," and "put too much on the other employees." And it is clear that much of the time, and perhaps all of it, Lackland worked at a slower pace than the other two members of the unloading team.

By Tuesday, July 29, Lackland had been on his new job for nearly 2 weeks. Nonetheless, he continued to work slower than his fellow employees. In at least one instance, moreover, he refused to help them dismantle some unloading equipment at the end of the day. That led one of the other members of the railroad car unloading team to complain to Tucker again. Tucker observed the team's work, saw that Lackland was not keeping up, and told Lackland that. Later that same day, he saw more evidence of Lackland falling behind the other employees in his unloading efforts. Tucker again spoke to Lackland about it.

Finally, about July 31, when it again was obvious that Lackland was failing to keep up with his coemployees, Tucker told Lackland, according to Lackland's testimony: "The Company has worked with you, I have worked with you, and it just ain't working out. . . . I'm just going to have to let you go."[27]

Tucker spoke to Gardner about his decision, Gardner concurred with it, and on August 1 Lackland was discharged.

Lackland agreed that his work unloading railroad cars was subpar. As he put it: "I was trying the best I could. I just couldn't do it."[28] Thus, the only question is whether it was unreasonable of the Company to neither give Lackland more time to get accustomed to the unloading job nor take some action less severe than discharge. But I cannot find that Tucker's view that a week should have been enough for Lackland to get in shape, or the Company's decision to fire Lackland rather than take some less drastic action, is any indication of discriminatory motive. Tucker's testimony about his belief that a week should be enough for any employee to get

[27] Tr. 529.
[28] Tr. 531.

into shape for the railroad car unloading job was credible, and nothing in the record either directly indicates that Tucker's testimony on this point was not truthful or shows that an average employee in Lackland's shoes would have been unable to do the railroad car unloading job satisfactorily after a week's acclimatization. As for the discharge, Lackland had failed to properly carry out his duties as a forklift driver and then failed to perform properly in the railroad car unloading job. Given that double failure, there is nothing suspicious about the Company's decision to discharge Lackland rather than find another kind of job for him.

## VIII. MAXWELL'S REPRIMANDS

### A. *The April 30 Reprimand*

In middle or late April 1980, Maxwell pulled too many cases on a particular order. The checker caught the error, so the error did not result in any cost to the Company. Tucker spoke to Maxwell about the matter and told Maxwell to be especially careful since many of the items in Maxwell's area of the warehouse were relatively costly (such as frozen shrimp and crab legs). Then, on April 30, Maxwell pulled cases in lot number 66936 rather than the 66935 lot number called for by the delivery ticket. Moreover Maxwell pulled two more cases than the delivery ticket called for. Maxwell claimed that the lot numbers on the cases were difficult to read. From Tucker's point of view it was obvious that Maxwell had been careless since (1) all of the cases that Maxwell pulled bore the wrong lot number and (2) faded lot numbers failed to explain the improper quantity that Maxwell pulled. That led Tucker to give Maxwell a written reprimand.[29]

There is simply no evidence that Maxwell's support for the Union or his testimony at the March 1980 hearing in this proceeding had anything to do with the reprimand. Maxwell pulled an order improperly not long after being criticized by a supervisor for a similar mistake, criticism or discipline of employees by Mid-South supervisors for miscounts of various kinds are common; and there is no dispute that the facts stated on the reprimand were accurate.

### B. *Maxwell's May 12 Reprimand*

In view of the subzero temperature of the Annex's storage areas, all of the Annex's pullers wear "freezer suits" in order to do their jobs. Maxwell is no exception.

At lunchtime on May 12, 1980, Maxwell, while still wearing his freezer suit, decided to go to a restaurant across the street from the warehouse. It was raining, but only lightly, when Maxwell left the warehouse. When the time came for him to return, however, it was raining hard. Whether or not Maxwell could have done something to keep himself and/or his freezer suit dry, he did not. He crossed the street wearing the freezer suit, getting the freezer suit very wet. That was a problem since working in the freezer with a wet freezer suit would have almost guaranteed serious sickness or injury. Maxwell's response was to take off the freezer suit and hang it in the warmup room to dry out. While the suit was drying Maxwell helped out on the warehouse dock. He did not discuss any of this with any Mid-South supervisor.

Tucker came across Maxwell while Maxwell was working on the dock. Tucker let it be known that he wanted Maxwell in the freezer, to which Maxwell responded something on the order of "I'm not going into the freezer," and then, when he noticed Tucker's look of incredulousness, explained that his freezer suit was wet. Tucker's response was to tell Maxwell to come into the office.

In the office, Tucker told Maxwell that Maxwell should have reported the problem, and that if he had, Tucker could have made available to Maxwell an extra freezer suit that the Company kept on hand. Tucker then determined to give Maxwell a reprimand. Tucker testified credibly that his decision was based on the facts that (1) Maxwell had refused his order to go into the freezer; (2) Maxwell had not told Tucker about the problem; and (3) Maxwell should not have worn the freezer suit in the rain. The reprimand itself states that Maxwell was "Warned for refusing to obey work order. Based upon your failure to maintain proper care of work clothes."[30]

Tucker's reprimand of Maxwell was a reasonable response to Maxwell's behavior. And nothing that Tucker did or said in any way suggested that his actions were motivated by Maxwell's testimony on behalf of the General Counsel back in March, or by Maxwell's prounion stance, or by any other protected activity. In sum, there is no indication that the disciplinary incident was discriminatorily motivated.

## IX. ALLEGATIONS THAT TUCKER CONNECTED PAY RAISES WITH SUPPORT FOR THE COMPANY AGAINST THE UNION

In early July 1980, Mid-South gave pay increases to all its employees. Tucker handled that by calling each of the Annex employees into his office individually, and advising each employee of the raise he was to get. Practically all of the employees got raises of 25 cents per hour. John Henry Jones, Jr. and C. M. Mason were two of the employees Tucker spoke to.

As Jones related it, Tucker told Jones that he "was doing a darn good job," and that his raise would be 25 cents per hour. Tucker then told Jones that he thought that he could get Jones "a little bit more,"[31] and telephoned Gardner about the matter. After a short telephone conversation, Tucker told Jones that he would be getting a 30-cent-per-hour raise and then went on to say, according to Jones' testimony: "I hope that you will be for the Company. I don't know which way you are going to go, but I hope you will go that way."[32]

The conversation apparently went on a little while longer with Tucker saying something about blood being "thicker than water," an apparent reference to John

[29] G.C. Exh. 11.

[30] G.C. Exh. 12.

[31] Tr. 739.

[32] Tr. 740.

Henry's brother, Oscar Jones, a Mid-South employee who was strongly prounion. Jones agreed that Tucker did not ask Jones about his views on the Union, did not say that the raise had anything to do with Jones' position regarding the Union, and did not say that any future raise would be connected with Jones' position regarding the Union.

Tucker's testimony was generally in accord with Jones' on matters pertaining to the wage increase. But Tucker denied saying anything to Jones about being for the Company or against the Union.

Mason's testimony was much the same as Jones'. Tucker told Mason about a 25-cent-per-hour wage increase Mason was to get and then said, according to Mason:

> They're fixing to start the Union back up . . . . I wish you'd stay away from it. . . . You're a grown man. You're going to do what you want . . . But . . . I wish you would stay away from it."[33]

Mason responded, he said, with an "I will," to which Tucker said: "so, you go on like that. . . . I hope you will stay away from it."[34]

As in Jones' case Mason agreed that Tucker did not ask Mason about Mason's position on unionization, did not say that the raise had anything to do with Mason's union views, and did not say that future raises would be connected with Mason's position regarding the Union.

Tucker denied saying anything to Mason regarding staying away from the Union or being for the Company or the like.

I credit Jones and Mason. The language Jones and Mason testified that Tucker used sounds like the kind of language he would have used. Moreover, statements of that kind would have been squarely in keeping with the belief Tucker obviously held that the best way for an employee to benefit himself was to support the Company in all ways, even if that meant opposing representation by a union.

The question that then follows is whether those statements by Tucker amount to a violation of the Act. My conclusion is that they do not.

The first issue is whether Tucker's comments to Jones and Mason amount to violations of Section 8(a)(1), putting aside for the moment the fact that they were made in the course of the same conversation that the employees were notified that each was getting a wage increase. Tucker's language made it very clear, after all, what position he preferred Jones and Mason would adopt regarding the Union; the conversation took place in the warehouse office—"the locus of managerial authority";[35] the conversation could not be said to be friendly banter; each employee was alone in the office with Tucker and thus without the support of his co-employees, and Mason's response ("I will") suggests that he may have felt coerced.

But Tucker's words were precatory ("I wish" and 'I hope,") and Tucker used other phraseology that made even clearer that his statements were mere expressions of his personal views, ("I don't know which way you're going to go," "you're a grown man," "you're going to do what you want"). Moreover, it was obvious that Tucker did not call either Jones or Mason into the office for the express purpose of discussing union questions;[36] Tucker was the only supervisor present and, as foreman, he was at the lowest level of Mid-South's managerial hierarchy;[37] no union organizing effort was underway at the time, and there is no indication that Tucker's tone of voice was hostile or threatening.

Under all these circumstances it does not appear to me that Tucker's statements were violative of employee rights—putting aside the close chronological link of those statements to Tucker's reference to Jones' and Mason's wage increases. Indeed, the complaint does not allege otherwise.[38] Rather, what the complaint does allege is that the timing of Tucker's expression of views carried with it the necessary inference that Jones' and Mason's wage increases were associated with the two employees' "support of Respondent against the Union's organizing effort." But the evidence does not sustain that allegation.

That is most obvious in Manson's case. Munson got the same 25-cent-per-hour increase that most of Mid-South's employees got, including visibly prounion employees. Manson had to have been aware of that in view of the nature of the Annex employees' interrelationships. Given that, and given the fact that Tucker said nothing to connect that wage increase, or any future one, to Munson's position regarding the union, the circumstances of Tucker's talk with Munson could not be said to reasonably tend to lead employees to believe there was a link between a wage increase and an employee's views on unionization.

The issue is closer regarding Jones, since he received a 30-cent-per-hour increase, 5 cents more than most employees.[39] And consideration of the matter must of course:

> . . . take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.[40]

But again, Jones must have been aware that all other employees were also receiving wage increases, albeit slightly smaller ones. And in view of the noncoercive language Tucker used and the absence of any words linking wage level with union position, my recommendation is that the Board conclude that Tucker's meeting

[33] Tr. 746–747.

[34] Tr. 747.

[35] E.g., *Durango Boot*, 247 NLRB 361 (1980).

[36] Compare *Durango Boot*, supra.

[37] See fn. 36, supra.

[38] See par. 7(c) of the amended complaint (G.C. Exh. 6(k).

[39] According to Tucker's undisputed testimony, all of the Annex employees got 25-cent-per-hour increases except for one employee who got a 40-cent increase, one who got a 35-cent increase, and Jones, who got a 30-cent increase: Tr. 840.

[40] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

with Jones did not runafoul of Section 8(a)(1) in any respect.

### X. OVERVIEW

Sections III–IX of this decision analyze, one incident at a time, numerous interactions between Mid-South supervisors and various Mid-South employees. Viewed in that manner none of those incidents indicate discriminatory motivation on the part of Mid-South's management.

Yet the apparent reasonableness of a company's behavior viewed on an incident-by-incident basis can mask discriminatory behavior that becomes obvious when one steps back to look for patterns in the company's actions. And clearly the evidence in this proceeding aligns itself into two noteworthy patterns.

The most obvious is the general crackdown on Annex employees that began in September 1979 and continued throughout the 11 months at issue in this proceeding. The other relates to Lackland: He had little trouble with his supervisors until September 1979, which was when his union activity began. Then, however, he became the recipient of a steady stream of criticism and disciplinary action.

But the crackdown experienced by the Annex employees was clearly a function of Tucker's arrival on the scene, as already discussed in Sections II and IV, and did not stem from any antiunion motivation by Mid-South. As for Lackland's problems, the pattern noted above calls for a close look at Mid-South's actions. That is particularly so in view of testimony which suggested that Lackland's work habits, while less than wholly desirable, had been much the same for years. But considerable evidence of record rebuts the inferences raised by the timing of the Company's actions against Lackland. Thus the record shows that the source of practically all of Lackland's difficulties was the presence of a more assertive foreman—Tucker, again. And as for Lackland's relatively minor run-ins with Gardner and Berretta, those incidents simply do not reflect discriminatory motivation, however carefully one looks for it.

In sum, while Lackland and some other Annex employees plainly felt that it was their activities on behalf of Local 667 that was the cause of the more vigorous supervision that began at the Annex in September 1979, the record fails to show that that was in fact the case.

### CONCLUSIONS OF LAW

1. Respondent Mid-South Refrigerated Warehouse Company, Inc. did not engage in any of the unfair labor practices alleged in the complaint.

2. Mid-South did not engage in any of the conduct described in Objections 2, 4, and 5 of Local 667's Objections to Conduct Affecting the Result of the Election.

Pursuant to Section 10(c) of the Act, I issue the following recommended

### ORDER[41]

The complaint is dismissed in its entirety.

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[41] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.